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90-1901

No. A-786

Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1990

ESTATE OF KATHLEEN JO PRICE, Deceased, JANINE ADAMICK and JOSEPH ADAMICK,

Petitioners,

vs.

NEVADA RESORT ASSOCIATION, BALLY'S, INC., formerly known as MGM, INC. and MGM GRAND HOTEL, INC., ELIAS GHANEM, THOMAS BYER, LAS VEGAS MEDICAL CENTER, MGM GRAND HOTEL, INC. AND CERTAIN SUBSIDIARIES; TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY; TRUSTEES OF NEVADA RESORT ASSOCIATION HEALTH AND WELFARE TRUST; and METROPOLITAN LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JANICE M. HAYES
Nevada Bar # 001881
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135
Attorney for Petitioners

QUESTIONS PRESENTED

1. Did the district court abuse its discretion when it imposed Rule 11 sanction on an attorney, when the court orally dismissed some, but not all, defendants, ordered counsel to file a Second Amended Complaint in five days; counsel included these in said complaint with a qualifying statement that she did so to preserve her clients' rights, the court granted defendants's motions to strike references to them in January, 1986, and the court did not consider alternatives such as dismissing defendants from the Second Amended Complaint?

2. Did counsel reasonably believe that her clients had standing to continue litigation after the death of the original plaintiff under E.R.I.S.A., 29 U.S.C. §1002(8), 18 U.S.C. §1962, 29 U.S.C. § 1132(a)(1)(b) and under Nevada law, and

other well founded beliefs regarding a non-defendant insurance company's attorneys' allegations that decedents' death may be due to actions of MGM and other defendants, and is there a conflict between statutes governing employee benefit plans and Nevada's at-will employment statutes?

3. Is there a conflict between the circuits as to whether an Order granting a motion to strike references to defendants in an amended complaint is a final order, and do district judges grant motions to strike to avoid ruling on the merits and on controversial claims?

4. Did counsel receive a due process hearing at oral argument as the court had already prejudged the issue, had limited argument to the sanctions issue only and did not know another consolidated case was to be heard and had not read briefs?

PARTIES

The real party in interest in the proceedings below is Janice M. Hayes, counsel for the nominal plaintiffs-appellants, Estate of Kathleen Jo Price, Deceased, Janine Adamick and Joseph Adamick, who were substituted as plaintiffs upon the death of the original plaintiff, Kathleen Jo Price, their adult daughter.

This case concerns collateral orders of the district court imposing sanctions on counsel only and releasing an appeal bond to defendants before the sanctions appeal was decided, each of which orders in a final, immediately appealable order in the Ninth Circuit Court of Appeals.

Only defendants-appellees Thomas Byer, M.D., Elias Ghanem, M.D., and Las Vegas Medical Center were appellees and they are the only respondents herein.

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No. A-786

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ESTATE OF KATHLEEN JO PRICE,

Deceased, et al.,

Petitioners,

vs.

NEVADA RESORT ASSOCIATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners and their counsel, Janice M. Hayes, Real Party In Interest, respectfully pray that this Court issue a Writ of Certiorari to review the Memorandum order of the United States Court

of Appeals for the Ninth Circuit in Nos. 87-2575 and 89-16462, consolidated appeals from collateral orders in *Estate of Kathleen Jo Price, Deceased, et al. v. Nevada Resort Association, et al,* which was entered on November 21, 1990, and appears in the appendix herein as p. 1a.

OPINIONS BELOW

The Memorandum order of the Court of Appeals was not reported and is at p. 1a. The Order of the District Court for the District of Nevada in Case No. CV-S-84-447 - PMP, *Estate of Kathleen Jo Price, Deceased, et al. v. Bally's Grand, Inc., fka MGM Grand Hotels, Inc., et al,* which imposed sanctions on counsel only, 14a, was entered on July 8, 1987 and was not reported. The Order of the Court of Appeals denying a petition for rehearing, entered January 25, 1991, was not reported and is at 24a.

JURISDICTION

Jurisdiction is conferred upon this Court by 28 U.S.C. §1254(1). The Order of the Court of of Appeals sought to be reviewed was issued on November 21, 1990, 1a, infra. Circuit Judge Harry Pregerson granted an extension of time to December 28, 1990, to file a petition for rehearing by Order entered on December 14, 1990, 26a.

Counsel timely mailed the petition for rehearing by Express Mail, Return Receipt Requested, and the U.S. Postal Service attempted delivery to the court at 1:30 p.m. on December 28, 1990, but found no one on duty to receive the package. The Postal Service's statement is at 2a.

The petition was filed on January 2, 1991, as the court was closed on December 29, 30 and 31, 1990 and January 1, 1991. The clerk's staff assured counsel that

the petition was deemed timely and would not have been filed if it were considered to be untimely.

Counsel, nevertheless, sent a motion for leave to file the already received petition late, which was delivered by Federal Express on January , 1991. The Clerk again advised counsel that the petition was timely filed and that her motion was unnecessary.

The court of appeals issued an Order denying the petition for rehearing, without comment, on January 25, 1991, 2 a.

By Order dated April 19, 1991,, the Honorable Sandra Day O'Connor granted an extension to May 24, 1991, in which to file a Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules which are relevant to the

determination of this case are the First, Fifth and Fourteenth Amendments to the United States Constitution, Rules 11, 12(b)(6), 12(f), 15(c), 54(b) and 58 of the Federal Rules of Civil Procedure and an attorney's right and duty to properly represent her client's interests.

The First Amendment provides in relevant part:

> Congress shall make no law . . abridging the freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

The Fifth Amendment to the Constitution provides in relevant part:

> (N)or shall any person be deprived of life, liberty or property without due process of law. . .

Counsel also respectfully suggests that although this petition concerns the imposition of sanctions on counsel in a

federal court, the provision of the Fourteenth Amendment concerning denial of the equal protection of the laws is applicable.

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part that

> The signature of an attorney or party constitutes a certificate by the signer that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law, and that if a pleading, motion or other paper is signed in violation of this rule, the court shall impose upon the person who signed it an appropriate sanction.

STATEMENT OF THE CASE

This case concerns the unwarranted imposition of sanctions on an attorney, Janice M. Hayes, real party in interest, because she included claims which Nevada District Judge Howard D. McKibben orally dismissed in a Second Amended Complaint,

which the district judge ordered counsel to file in five days or risk dismissal of her client's entire case. The sanctions were imposed notwithstanding that Hayes noted the court's oral order in the Second Amended Complaint and stated that she included several defendants to protect her clients as there was no written order dismissing them.or claims.

This petition concerns Orders pertaining to only three defendants in the multi-party suit, Elias Ghanem, Md., Las Vegas Medical Center and Thomas Byer, M.D., and they are the only respondents in this court.

The original sole plaintiff, Kathleen Jo Price, brought an action in federal court on July 12, 1984, alleging that all defendants acted and conspired together in a common scheme to deprive her and other employees of certain Las Vegas casino-hotels of continued employment, sick

leave, medical treatment or surgery, insurance, salary continuance benefits and other programs established under ERISA, Employees Retirement Income Security Act, 29 U.S.C. §1002, et seq., or unemployment or worker's compensation benefits or alteration in working conditions, under The Rehabilitation Act of 1973, §504, as amended, 29 U.S.C. §794.

Price also alleged retaliatory discharge for previously filing a Worker's Compensation claim and sex discrimination as to equal pay, insurance and leave.

Price was injured in July, 1984 when she tripped over a pothole in MGM's employee's parking lot and hit her head. She was transported to Ghanem's Medical Center by MGM employees in a MGM vehicle. Ghanem's bill were apparently paid either under MGM's self-insured worker's compensation or by MGM's employee insurance.

Price continued to work. When she appeared ill when she arrived at work one day, she was transported by MGM staff to Respondent Ghanem's clinic, where Ghanem found she possibly had lupus erythmatosus and advised she take sick leave. MGM fired her a few days later, claiming she had taken unauthorized leave.

The Nevada Employment Security Department found no misconduct and awarded Price unemployment benefits.

Price alleged that Ghanem deliberately composed a note to MGM that he knew MGM would find inadequate. Ghanem and Byer submitted Affidavits in support of MGM at the unemployment appeal hearing, although Price's health was not at issue.

Ghanem is an extremely wealthy doctor who, without justification, tried to prevent Price from receiving $96 a week. Her medical insurance terminated when she was fired, and she became virtually

uninsurable and unemployable when prospective employers found she had been diagnosed as possibly having lupus.

Price filed the instant action on July 12, 1984. She died unexpectedly of accidental poisoning on July 19, 1984.

The original complaint was not served on any defendant. Price's parents filed an Amended Complaint Of Right on April 3, 1985, substituting Price's Estate and naming Janine and Joseph Adamick as plaintiffs.

The district court held a hearing on various motions to dismiss and for summary judgment and sua sponte, ordered or gave plaintiffs' five days to file a Second Amended Complaint on January 7, 1986.

The court did not rule on all claims as to all defendants. It orally granted summary judgment to the Ghanem defendants for alleged want of federal subject matter jurisdiction and ordered defendants'

counsel to file a Second Amended Complaint in five days. Counsel included dismissed claims with a qualifying statement that she did so to preserve her client's rights.

Defendants moved to strike references to them. The district court granted said motions and imposed sanctions on plaintiff's counsel.

The court of appeals affirmed. It erroneously believed that a final order had been entered and did not have all materials available to it, as set out in the reasons for granting the writ.

REASONS FOR GRANTING THE WRIT

The district court acted arbitrarily in entering an oral order dismissing some, but not all defendants, and then ordering counsel to file a Second Amended Complaint in five days.

The court refused to rule on one

defendant, MGM Grand Hotels and Certain Subsidiaries, which is the E.R.I.S.A. plan sponsor and administrator named in MGM's Employee handbook. Judge McKibben declared that it was "a non-existent entity. The refusal to rule as to one defendant prevents any judgment from being final, **California v. Harvier**, 700 F. 2d 1217, 1218, **cert denied**, 464 U.S. 820 (1983). Plaintiffs have never abandoned their objection to lack of a final judgment, citing **United States v. Indrelunas**, 411 U.S. 216, 93 S. Ct. 1562, 36 L.Ed 202 (1973).

Plaintiffs' contention that Price stated a claim under Section 504 of the Re-Habilitation Act of 1973, 29 U.S.C. §794, as MGM discriminated against her and fired her because of its perception was validated by this court's decision in **School Board of Nassau County, Fla. v. Arline**, 107 S. Ct. 1123 (1987). The

Court of Appeals' decision in **Kunin v. Benefit Trust**, 910 F. 2d 534 (9th Cir. 1990), indicated that persons such as the Adamicks, beneficiaries of Price's life insurance policies, had standing.

The district court intentionally issued defective orders under Rule 54(b), which plaintiffs were forced to appeal. The court of appeals dismissed appeals 87-1941, 87-2309 and part of 87-2575 for this reason, citing **Briscoe v. Morrison-Knudsen Co.** 776 F2d 1414 (9th Cir. 1976). The district court also ruled that a grant of a motion to strike references to a defendant in a complaint is a final Order, which should have been appealed, in its August 10, 1988 Order, which he cited in the Judgment and Order, 23a and 24a, entered by Judge Pro on February 23, 1989. The Judgment is deficient on its face as it refers to a prior order in contravention of Fed. Rules of Civ. Proc. 54 and 58's

clear statement that a judgment shall not contain a recital of pleadings or a record of prior proceedings.

II. Counsel Reasonably Believed That Her Clients Had Standing To Continue Litigation After The Death Of The Original Plaintiff.

Counsel reasonably believed that her clients, Janine and Joseph Adamick, parents of the original plaintiff, Kathleen Price, had standing to continue the suit on several bases.

Under Nevada law, Peters v. Estate of Peters, 92 Nev. 687, 557 P. 2d 713, the Adamicks, who were benefciaries, would become owners of Price's life insurance policies immediately upon her death, had MGM not terminated her employment.

There is also an unresolved issue as to whether Price correctly believed that defendants Ghanem and Byer were her own

private physcians. If so, there is a caus of action against them for submitting Affidavits against her interest without her consent or request at the Unemployment Security Department hearing.

Price also alleged that the defendant doctors had acted together in a common scheme, actionable under 18 U.S.C. §1962, to terminate employment of persons who wer ill or perceived to be ill, and that all defendants benefitted from said scheme.

If Ghanem and Byer were participants in MGM's E.R.I.S.A. benefit plans for its employees, said fact was never disclosed, and the Adamicks have standing.

In Harper v. American Chambers Life Ins. Co., 898 F. 2d 1432 (9th Cir. 1990), the court found that E.R.I.S.A. preempts all state law claims of breach of contract, breach of the covenant of good faith and fair dealing. The court also found that the Harpers might be able to sue as

a participant or beneficiary of a plan, 29 U.S.C. §1132(a)(1)(b), and concluded they were "beneficiaries" under 29 U.S.C. §1002(8), at 1434.

In addition, the district court found the Adamicks had standing to prosecute a claim under Title VII based on sex discrimination as to pay and insurance benefits. and even set said matter for trial, over plaintiffs' objections as they wanted a trial as to all claims and defendants.

Petitioners had a good faith belief that the may have been a cause of or contributed to their daughter's death, as an insurance company, Fireman's Fund, now Amex, Inc., not a party to the suit, did not pay $50,000 in proceeds from and accidental death and dismemberment policy issued to Price through the Nevada Federal Credit Union, also not a defendant below, will not give a reason for its failure to do so or why it doubts the finding of the

Clark County Coroner that Price died by accidental means without any contributing causes as stated in the official Death Certificate. Fireman's attorneys have insinuated that Price's death may have been attributable in some way to respondents Ghanem and Byer or that there was a suicide due to unhappiness over the way MGM treated her or as a result of head injury. but refuse to give a reason for their beliefs as they are required to do under Nevada Revised Statute 686.310(3) and (5).

Petitioners are justified in not dismissing their claims against MGM and other defendants until these issues are resolved.

There is a conflict between Nevada's "at-will" employment termination statutes and the rights of workers under E.R.I.S.A. plans for their benefit and federal and state laws.

II. Is There A Conflict Between The Circuits As To Whether An Order Granting A Motion To Strike References To Defendants In A Second Amended Complaint Is A Final Order, And Are District Judges Impermissibly Entering Said Orders To Avoid Ruling On The Merits And Making Findings Of Fact And Conclusions Of Law As To Controversial Or Unpopular Issues And Claims Against Large Corporations And Nevada Casinos?

The Nevada District Court has found and many defendants allege that an Order granting a motion to strike references to defendants in an Amended Complaint Or Second Amended Complaint is a final Order, and the Ninth Circuit Court Of Appeals has apparently also adopted this theory,

where the district court's "judgment" was based on status reports of defendants, some of whom claimed that petitioners failed to appeal from different orders striking references to them in the Second Amended Complaint the court ordered counsel to file in five days.

District judges are thus issuing oral orders to amend a Complaint and then striking references to purportedly dismissed defendants in the complaint, which practice allows judges to enter final orders without stating any reason therefore, that they could not do by simply dismissing defendants without certifying the order as final under Rule 54(b) and giving a reason for its issuance and making findings of fact which can be challenged on appeal. Said practice also allows judges to avoid ruling on controversial issues and to avoid appellate review, if unwary counsel do not appeal.

IV. Did The Circuit Court Deprive Counsel Of The Right Of Access To The Court And A Due Process Hearing Secured By The First And Fifth Amendments When It Did Not Know Of Consolidation Of Another Appeal, Had Limited The Hearing To Sanctions Issue Only?

The merits panel of the Ninth Circuit Court of Appeals deprived counsel Janice Hayes of her Fifth Amendment right to due process and her right of access to the courts secured by the First Amendment, as it had prejudged the case, and could not reasonably believe that a motions panel's order dismissing an appeal because the district court's certification of an Order under Rule 54(b) was defective, which pertained to appellants other than the respondents herein, was an adjudication on the merits. The

merits panel referred to a motions panel's Order of April 20. 1989, in its Memorandum at 2a, referring to the case before it, 87-2575, and saying 3a, that "a panel of this court dismissed the appeal," thereby erroneously implying that a motions panel had "dismissed" the issue of the sanctions.

The court of appeals was unaware of the motion panels' Order of March 9, 1990, consolidating 87-2575, (sanctions) and 89-16462, (premature release of an appeal bond by the district court), and requiring appellants to file yet another Opening Brief, 6a. Appellants thus had to file four Opening Briefs on the above issues alone and several Excerpts of Record and ask the court to consider the transcripts already on file in the three other appeals, all taken from the same district court case. The hearing panel was unaware of other orders entered by

motions panels, including the September 1, 1989 Order which reinstated that part of 87-2575 which concerned the sanctions appeal, 8a, infra, or that the April 20, 1989 order, 10a, dismissed only that part of 87-2575, which dismissed the Trustees of the Nevada Resort Association Health and Welfare Trust for want of a proper Rule 54(b) certification, or the Order filed May 2, 1988, 12a, infra, which dismissed No. 87-1941, an appeal from another intentionally defective Rule 54(b) Order issued by District Judge Howard McKibben of Nevada.

The May 2, 1988 Order, 12a, also dismissed No. 87-2309, which concerned another deficient Rule 54(b) Order as to the respondents herein, Elias Ghanem, Thomas Byer and Las Vegas Medical Center.

The merit panel was unaware that Judge McKibben had entered three 54(b)

"judgments" which omitted the requisite determination, "there is no just reason for delay," until Hayes told them at oral argument. The hearing panel clearly also had not read briefs which they did not know existed.

Hayes did not know at argument that the panel did not know about later orders of motions panel and the clerk, 6a., nor that the panel impermissibly relied upon the errenous statements of opposing counsel that the underlying case had been dismissed. The May 2, 1988 Order of a motions panel, 8a, erroneously stated at 9a, "Here, the district court entered final judgment February 23, 1989. However, the court is informed that plaintiffs filed a timely post-judgment for reconsideration."

The issue of a final judgment has never been before the court of appeals as there is no final judgment in the

underlying case. The district court refused to enter any order as to defendant MGM Grand Hotels, Inc. and Certain Subsidiaries, which is the E.R.I.S.A. plan sponsor and administration of employee insurance plans listed in MGM's Employees Handbook, claiming it was a "non-existent entity." In fact, District Judge McKibben imposed a $200 sanction on counsel for listing this entity as a defendant. He relied on a stipulation between plaintiffs and defendants MGM and Nevada Resort Association, represented by the same counsel, and approved by the court, 21a. Said Stipulation, however, contained no reference to MGM Grand Hotels, Inc. and Certain Subsidiaries, 21a - 23a.

A judgment which omits any defendan is not a final order, California v. Harvier, 700 F. 2d 1217, 1218, cert denied 464 U.S. 820 (1983).

The judgment, 18a, is defective in

that it refers to another order, contrary to Federal Rule of Civil Procedure 54(b). "A judgment shall not include . . . the record of prior proceedings."

Incidentally, MGM's counsel listed MGM Grand Hotels , Inc. and Certain Subsidiaries as his client in appeal No. 86-2934, and sought attorney's fees on behalf of his non-existent client.

The district court's Judgment, 18a, was based solely on status reports of the parties. 19a, Order of February 23, 1989.

The merits panel was not the "neutral and detached" magistrate required by the Fifth Amendment. The hearing panel impermissibly relied on an impression that the sanctions issues had already been decided. It refused to hear counsel Hayes's motion for sanctions against counsel for the Ghanem appellees, Order, 4a, issued on November 1, 1990, and received by Hayes in Las Vegas just before she left for the

November 7, oral argument.

Counsel respectfully suggests that the panel had a purpose not disclosed to Hayes, i.e., it intended to impose additional sanctions, as the court schedules cases with related issues before the same panel and the other cases on calendar concerned one Robert Young, who had filed at least seventeen cases against the same persons and never paid sanctions imposed against him.

In contrast, Hayes filed only seven cases in ten years as an lawyer, none of them against the same defendants, and earlier cases in proper person before she became an attorney in 1980, challenging a Nevada procedural rule, which was changed in 1981 as Hayes had argued it should be.

Hayes has never filed an motion for Rule 54(b) certification.

Hayes is a plaintiff in an action removed by IRS wherein Hayes sought only

records pertaining to a 2½% stock certificate which she and her former client, allege to be an ownership interest in the Horseshoe Club in Las Vegas. Judge McKibben remanded the rest of the action. The case was CV-S-88-997-HDM and Case No. 89-16209 on appeal. A briefing schedule has just been set.

The references to "merits panel" and "motions panel" derives from Circuit Rule 27-1 and the Circuit Advisory Committee Note to Circuit Rule 27-1 (1), (2)(a), (b) and (c), which explain that Motions to dismiss, for clarification and similar motions are acted upon by a motions panel. The panel which makes a disposition as to the appeal is the merits panel. In this case, all orders except the Memorandum of November 12, 1990, 1a, and the Orders of November 1, 1990, 4a, December 14, 1990, 26a, and January 25, 1991, 24a, were issued by a motions panel, including the April 20, 1989 Order, 10a, on which the merits panel relied.

IV. THE RULE 11 VIOLATION CRITERIA OF 1984 AND 1985 SHOULD BE APPLIED.

The standard governing frivolousness and improper purpose are both objective, **Zaldivar v. City of Los Angeles**, 780 F. 2d 823, (9th Cir. 1986), cited in the circuit court's Memorandum. The **Cooter** court recognized that Rule 11 "must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy", at 2454. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," **Cooter**, at 2454.

Counsel filed the Second Amended Complaint prior to **Golden Eagle Distributing Corp. v. Burroughs Corp.**, 801 F. 2d 1531 (9th Cir. 1986) was decided.

The district court should have utized the least drastic remedy available

and simply dismissed all of the complaining defendants in one Order and certified that Order as final properly under Rule 54(b), thus having only one appeal to the court of appeals instead of five.

CONCLUSION

The district court erred in imposing sanctions on counsel when it ordered her to file a Second Amended Complaint in five days, orally dismissed some, but not all claims in a multi-defendant case and counsel timely filed said Complaint but included a qualifying phrase acknowledging the oral Order but saying she had to protect her clients' rights.

The district court should have used the least stringent measure, which would be to dismiss all of said defendants and claims in one Order and then certify the Order under Rule 54(b) as a final order, or not do so and allow plaintiffs to wait for a final order from which they

could notice an appeal.

The district court unnecessarily and intentionally multiplied the proceedings by certifying three separate order under Rule 54(b) and omitting the phrase that there is no just reason for delay, and spacing said orders far enough apart so that plaintiffs had to take another appeal each time.

The court of appeals so far departed from the accepted and usual course of judicial proceedings and has sanctioned such a departure by a lower court as to call for an exercise of this court's supervision, pursuant to Supreme Court Rule 10(a), and by letting stand the lower court's ruling that an order striking references to a defendant from an amended complaint is a final order, it has entered an order in conflict with another court of appeals.

Counsel was deprived of a right of access to the court, a meaningful due process

hearing as the panel hearing oral argument had prejudged the case and believed erroneously that a motions panel had already dismissed the appeal, and of the equal protection of the laws, in violation of rights secured by the First, Fifth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

JANICE M. HAYES, ESQ.
Nevada Bar # 001881
3391 S. El Camino Road
Las Vegas, Nevada 89102
Telephone: (702) 871-5135

Attorney for Petitioner

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Memorandum of the Court of Appeals in Nos. 87-2575 and 89-16462 filed on November 21, 1991. 1a

Order of the Court of Appeals in No. 87-2575 only issued on November 1, 1991, that oral argument on November 7, 1991 would be limited to the sanctions order against counsel Janice Hayes. 4a

Order filed March 9, 1990 consolidating 87-2575 and 89-16462 and directing that yet another Opening Brief be filed. 6a

Order of the Court of Appeals granting motion for clarification, and reinstating that part of 87-2575 which concerned the sanctions order, entered on September 1, 1989 in appeal 87-2575 only, and directing appellants to file a new Opening Brief limited to the sanctions Order. 8a

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Order filed on April 20, 1989 in 87-2575 only, Judges Wallace, Alarcon and Norris, dismissing that part of 87-2575 which concerned the Trustees of the Nevada Resort Association Health and Welfare Trust, dismissing due to a defective Rule 54(b) certification. 10a

ORDER filed May 2, 1988, listing Nevada Resort Association as lead appellant, Judges Goodwin, Schroeder and Pregerson, Nos. 87-1941 and 87-2309 dismissing Transamerica Occidental Life Insurance Company, 87-1941, and the Ghanem defendants, 87-2309, because the district court's 54(b) certificates were deficient. 12a

ORDER filed July 8, 1987 in CV-84-447, HDM, listing Bally's Grand, Inc. as lead defendant, affirming then Magistrate Philip Pro's Order imposing sanctions on counsel Janice Hayes for allegedly forcing the Ghanem defendants to stay in the action after they were dismissed. 14a

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JUDGMENT IN A CIVIL CASE, filed February 23, 1989 in CV-S-84-447-PMP, dismissing action in favor of defendants. 18a

ORDER, filed February 23, 1989 in CV-S-84-447-PMP, entering judgment based upon status reports of parties and "in accordance with the Court's Order Dismissing this action entered Auguat 10, 1988." The Judgment, 18a, also referred to said August 10, 1988 Order. 19a

STIPULATION AND ORDER, filed April 25, 1985, between MGM's counsel and plaintiffs, which contains no reference to MGM Grand Hotels AND CERTAIN SUBSIDIARIES. 21a

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ORDER filed December 14, 1990 granting an extension of time to December 28, 1990 to file a petition for rehearing. 26a

ORDER filed January 25, 1991, denyiing the petition for rehearing and the motion for correction of clerical errors in the court's records. 24a

STATEMENT of U.S. Postal Service that it attempted delivery of petition for rehearing on due date, December 28, 1990 of counsel's Express Mail package to Court of Appeals. 27a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2575
89-16462

D.C. No. CV-84-447-PMP
D.C. No. CV-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, Deceased,
JANINE ADAMICK and JOSEPH ADAMICK,
Plaintiffs-Appellants,

NEVADA RESORT ASSOCIATION, BALLY'S,
INC., formerly known as MGM, INC. and
MGM GRAND HOTELS, INC., et al.,

Defendants-Appellees.

MEMORANDUM
(Filed November 21, 1990)

Appeal from collateral orders of the
United States District Court
For The District Of Nevada

The Honorable Howard D McKibben, Presiding,
The Honorable Philip M. Pro, Presiding

Argued and Submitted November 7, 1990
San Francisco, California

Before: BROWNING, PREGERSON, and TROTT,
Circuit Judges.

Janice Hayes, attorney for the estate of Kathleen Jo Price, appeals the district

court's orders (1) imposing Rule 11 sanctions against her in the amount of $3,000, (2) denying her motions for sanctions against Elias Ghanem, Thomas Byer, and Las Vegas Medical Center (collectively the Medical Defendants), and (3) releasing the bond Hayes posted to obtain a stay pending her appeal of the order imposing sanctions against her. We affirm.

The district court did not abuse its discretion in imposing sanctions against Janice Hayes based on her numerous filings of frivolous papers. See Cooter & Gell v. Hartmax Corp., 110 S.Ct. 2447, 2461 (1990). The court also acted within its discretion in refusing to award sanctions against the Medical Defendants. Hayes has not pointed to any conduct of the Medical Defendants that would justify the imposition of sanctions against them. Finally, the court did not err in releasing the bond given by Hayes pending her appeal (No. 87-2575) of

Hayes pending her appeal (No. 87-2575) of the order imposing sanctions against her because on April 20, 1989, a panel of this court dismissed the appeal.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2575

D.C. No. CV-84-447-HDM

ESTATE OF KATHLEEN JO PRICE, deceased; JANINE ADAMICK; JOSEPH ADAMICK;

Plaintiffs-Appellants

NEVADA RESORT ASSOCIATION; TRUSTEES OF NEVADA RESORT ASSOCIATION HEALTH & WELFARE TRUST; BALLY'S, formerly known as MGM GRAND HOTELS, INC.; METROPOLITAN LIFE INSURANCE COMPANY; ELIAS GHANEM, THOMAS BYER; MGM GRAND HOTEL, INC. AND CERTAIN SUBSIDIARIES; OCCIDENTAL LIFE INSURANCE COMPANY; LAS VEGAS MEDICAL CENTER,

Defendants-Appellees.

ORDER

(Filed November 1, 1990)

Appeal from the United States District Court For the District of Nevada

The Honorable Howard D. McKibben, Presiding

(Not argued)

Before: BROWNING, PREGERSON, and TROTT, Circuit Judges:

Circuit Judges:

Consistent with this court's order entered on September 1, 1989, this appeal is limited to review of the district court's Order of July 8, 1987 that imposed sanctions against appellants' counsel. Therefore, counsel for the Trustees of the Nevada Resort Association Health and Welfare Trust need not appear at oral argument because the appeal in its present posture does not involve any issue which (sic) they need be concerned.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2575

89-16464

D.C. No. CV-S-84-447-HDM
D.C. No. CV-S-84-447-PMP

ESTATE OF PRICE, et al. v.

NEVADA RESORT ASSOCIATION, et al.

ORDER

(Filed March 9, 1990)

Appellant's motion to file civil docketing statement late is Granted.

The Docketing Statement previously received shall be filed. Appellants' motion to file the Opening Brief late is Granted. The Opening Brief received on January 31, 1990 in 87-2575 and January 19, 1990 in 89-16462 shall be filed. The district court's statement of certification of record for 89-16462 will be issued forthwith.

Although separate Opening Briefs

have been filed in these appeals, the motion of appellees Ghanem, et al. to consolidate 87-2575 and 89-16462 is granted.

All answering briefs are now due on March 21, 1990. Appellees shall endeavor to comply with Circuit Rule 28-4.
The reply brief is now due on April 9, 1990.

The order is subject to reconsideration by a judge if an objection is filed within ten days.

Cole Benson

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2575

D.C. No. CV-84-447-HDM

ESTATE OF KATHLEEN JO PRICE, et al.,

Plaintiffs-Appellants,

BALLY'S, formerly known as MGM, INC. and MGM GRAND HOTELS, INC., et al.,

Defendants-Appellees.

ORDER

(Filed September 1, 1989)

Appeal from the United States District Court For the District of Nevada

The Honorable Howard D. McKibben, Presiding

(Not argued)

Before: WALLACE, HUG and SKOPIL, Circuit Judges:

The motion for clarification is granted. In this appeal, appellants

sought review of, inter alia, the district court order of July 8, 1987 which imposed sanctions against appellants' counsel. An immediate appeal of this order was required because the order was final. See Mesirow v. Pepperidge Farm, Inc., 703 F. 2d 339, 345 (9th Cir. 1983). However, the district court had not yet entered an order disposing of appellants' timely motion for reconsideration. Hence, we lacked jurisdiction over the remaining issues. See Fed. R. Civ. P. 4(a)(4). Accordingly, this appeal is reinstated as to the July 8, 1987 sanctions order only.

Appellants shall file a new opening brief limited to the issues raised by the sanctions order within 30 days of this order. Upon entry of this order, the Clerk shall set the balance of the briefing schedule.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-2575

D.C. NO. CV-84-447-HDM

ESTATE OF KATHLEEN JO PRICE, Deceased,
JANINE ADAMICK and JOSEPH ADAMICK,

Plaintiffs-Appellants,

BALLY'S, formerly known as MGM, INC.
AND MGM GRAND HOTELS, INC., et al.

Defendants-Appellees.

ORDER
(Filed April 20, 1989)

Appeal from collateral orders of
The United States District Court
For The District Of Nevada

The Honorable Howard D. McKibben,
Presiding

(Not Argued)

Before: WALLACE, ALARCON and NORRIS,
Circuit Judges

Due to a defect in the Fed. R. Civ. P. 54(b) certification, this appeal was filed prematurely. Orders whose finality normally would depend upon a Rule 54(b) certification may be treated as

treated as final when the case has been reduced to final judgment. Baker v. Limber, 647 F. 2d 912, 916 (9th Cir. 1981). Here, the district court entered the final judgment February 23, 1989. However, the court is informed that plaintiffs filed a timely post-judgment for reconsideration. Thus, jurisdiction remains in the district court. Accordingly, this appeal is dismissed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 87-1941
87-2309

D.C. No. CV-84-447-HDM

JANINE ADAMICK, as Administrator of the Estate of KATHLEEN JO PRICE, et al.,
Estate of KATHLEEN JO PRICE, et al.,

Plaintiffs-Appellants,

NEVADA RESORT ASSOCIATION, et al.,

Defendants-Appellees.

ORDER

(Filed May 2, 1988)

Appeal from the United States District Court For the District of Nevada

The Honorable Howard McKibben, Presiding

(Not argued.)

Before: GOODWIN, SCHROEDER, and PREGERSON, Circuit Judges:

The motion by appellees in appeal No 87-2309 to dismiss the appeals for lack of

jurisdiction is granted. The district court's orders of May 15, 1987 were not final, appealable orders as to these defendants because the orders did not dispose of all claims against these parties and the district court did not direct the entry of final judgment pursuant to Fed. R. Civ. P. 54(b). 28 U.S.C. §1291.

Appeal No. 87-1941 is also dismissed for lack of jurisdiction. this court lacks jurisdiction because the district court's certification under Fed. R. Civ. P. 54(b) lacks the requisite express determination that there is no just cause for delay. See Frank Briscoe Co. v. Morrison-Knudsen Co. 776 F. 2d 1414 (9th Cir. 1976).

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-S-84-447-HDM

ESTATE OF KATHLEEN JO PRICE, deceased, by its administratrix, JANINE ADAMICK, et al.,

Plaintiffs,

BALLY'S GRAND, INC., et al.,

Defendants.

ORDER ADOPTING MAGISTRATE'S ORDER

(Filed July 8, 1987)

On May 21, 1987, following a hearing arguments were heard in support of and in opposition to defendants Ghanem, Byer and Las Vegas Medical center's motion for sanctions, document 154, United States Magistrate Philip M. Pro entered an order imposing sanctions in the amount of #3,000. 00 against Janice M. Hayes, counsel for plaintiffs. Document number 193. Plaintiffs filed objections to the Magistrate's Order on June 5, 1987. Document number

198. Having considered the above-referenced pleadings, memoranda of the parties, and other relevant and timely filed matters of record, and having made a de novo review and determination in accordance with the requirements of 28 U.S.C. § 636 and the applicable case law, e.g., Campbell v. United States District Court, 501 F. 2d 196, 206 (9th Cir. 1974), that the Magistrate's Order is correct and not contrary to applicable law, the court hereby

AFFIRMS the Order of the United State Magistrate designated above (#193), and DENIES and OVERRULES plaintiffs' opposition and objections (#198). Accordingly,

IT IS ORDERED that plaintiffs' counsel, Janice M. Hayes, shall pay $1,000.00 in sanctions to Defendant Ghanem, $1,000 in sanctions to defendant Byer, and $1,000.00 in sanctions to defendant Las Vegas Medical Center. After reviewing the numerous pleadings, motions and other

papers filed by plaintiffs' counsel in this case, the Court agrees with the Magistrate that most of these documents are so without factual and legal foundation as to considered "frivolous or unreasonable." Zaldivar v. City of Los Angeles, 590 F. Supp. 852, 857 (C.D. Cal. 1984); see also Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F. 2d 1531, 1537-38 (9th Cir. 1986); Zaldivar v. City of Los Angeles, 780 F. 2d 823, 831 (9th Cir. 1986); Orange Production Credit Association v. Frontline Ventures Limited, 792 F.2d 797, 800 (9th Cir. 1986). By filing such meritless motions, plaintiffs' counsel has forced defendants Ghanem, Byer and Las Vegas Medical Center to continue as parties in this litigation, incurring substantial costs, for more than fourteen months after they were dismissed by order of the Court. Plaintiffs' counsel has provided no justification for pursuing

such a course of action--one which "a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." In re TCI Limited, 769 F.2d 1151, 1154 (7th Cir. 1986). Therefore, the Court concludes thatRule 11 sanctions are appropriate.

IT IS SO ORDERED.

DATED this 8th day of July, 1987.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CV-S-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, etc., et al.,

Plaintiffs,

BALLY'S, INC., et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

(Filed February 23, 1989)

Decision by Court.

IT IS ORDERED AND ADJUDGED Pursuant to the Court's Order entered August 10, 1988, this action is DISMISSED, and Judgment is hereby entered in favor of Defendants and against Plaintiffs.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-S-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, Deceased, etc., et al.,

Plaintiffs,

BALLY'S, INC., et al.,

Defendants.

O R D E R

(Filed February 23, 1989)

Pursuant to the Court's Order of January 11, 1989 (#323), the parties to this action have submitted status reports to the Court regarding the issue of whether, and to what extent, further Judgments must be entered in this case to finalize all proceedings and enable Plaintiff to perfect appropriate appeals. (Documents #326, #330, #331, #333 and #334.) The Court having read the status reports submitted, and in accordance with the provisions of

Rule 58 of the Federal Rules of Civil Procedure.

IT IS ORDERED that the Clerk of Court shall forthwith enter Judgment in favor of Defendants and against Plaintiffs in accordance with the Court's Order Dismissing this action entered August 10, 1988 (#305).

DATED: February 21, 1989.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CV-S-84-447-PMP

KATHLEEN JO PRICE, JANINE ADAMICK, individually and as Administratrix of the ESTATE OF KATHLEEN JO PRICE, Deceased, JOSEPH ADAMICK,

Plaintiffs,

MGM, INC., a Delaware corporation, dba MGM GRAND HOTELS, INC., et al.,

Defendants.

STIPULATION AND ORDER

(Filed April 29, 1985)

IT IS HEREBY STIPULATED AND AGREED by between David J. Rivers of the law firm of Lionel, Sawyer & Collins, attorneys for MGM grand Hotel - Las Vegas, Inc., Nevada Resort Association, Burton Cohen and Arlene Sondgeroth, and Janice M. Hayes, attorney for plaintiffs herein, as follows:

1. That plaintiffs be allowed to amend the caption to the complaint herein to name MGM Grand Hotel - Las Vegas, Inc. as a party substitution for what has heretofore been named as "Dba MGM Grand Hotels, Inc.;

2. That service of process upon Bernard Segelin, by and through his executive secretary, shall be viewed as completed service upon MGM Grand Hotel-Las Vegas, Inc.;

3. That service of process upon Vincent Helm shall be viewed as completed service upon the Nevada Resort Association;

4. That upon amendment of the caption of complaint herein, plaintiff's counsel shall serve the parties to this agreement with the amended complaint;

5. That MGM Grand Hotel-Las Vegas, Inc., Nevada Resort Association, Burton Cohen and Arlene Sondgeroth, shall have

to and including May 15, 1985, in which to answer or otherwise respond to plaintiffs' amended complaint.

IT IS SO ORDERED.

DATED this 29th day of April, 1985.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 87-2575

No. 89-16462

D.C. No. CV-84-447-HDM
D.C. No. CV-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, Deceased,

JANINE ADAMICK and JOSEPH ADAMICK,

Plaintiffs-Appellants,

NEVADA RESORT ASSOCIATION, et al.,

Defendants-Appellees.

ORDER

(Filed January 25, 1991)

Appeal from the United States District Court for the District of Nevada

The Honorable Howard D. McKibben, Presiding

(Not argued)

Before: BROWNING, PREGERSON and TROTT, Circuit Judges:

The petition for rehearing, filed

January 2, 1991, is denied. The Motion For Correction Of Clerical Errors In Docket Sheets, Orders, Records And Documents To Reflect That The Nevada Resort Association Has Never Been The Lead Defendant In The District Court Nor An Appellee Herein Herein And That Bally's, Inc. Is The Lead Defendant, filed January 2, 1991, is denied.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 87-2575, 89-16462

D.C. No. CV-84-447-HDM

D.C. No. CV-84-447-PMP

ESTATE OF KATHLEEN JO PRICE, Deceased;

JANINE ADAMICK: JOSEPH ADAMICK,

Plaintiff-Appellants,

NEVADA RESORT ASSOCIATION, et al.,

Defendants-Appellees.

ORDER

(Filed December 14, 1990)

PREGERSON, Circuit Judge.

Appellant's motion for an extension of time to file a petition for rehearing is GRANTED. Appellant's petition for rehearing is due December 28, 1990.

UNITED STATES
POSTAL SERVICE
Las Vegas NV 81999-9998

Date: 1/7/91

Express Mail S/N B52946662

Dear Customer:

Regarding your Express Mail inquiry, please note the following:

[ ] Delivery was made 1-2-91 at mid-night.

[ ] **Attempted Delivery was made** 12-28-90 at 1:30 P.M.

[ ] Your refund is DISAPPROVED:

[[Delivery (Attempted Delivery) was made within standards.

. . .
. . .

Express Mail Manager
1001 E. Sunset Rd.
Las Vegas, NV 89100-9604

(2)

No. 90-1901

Supreme Court, U.S.
FILED
JUL 5 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ESTATE OF KATHLEEN JO PRICE, DECEASED,
JANINE ADAMICK, individually, and
JOSEPH ADAMICK, individually, and
JANICE M. HAYES, Real Party in Interest,

Petitioners,

vs.

BALLY'S GRAND, BALLY'S GRAND, INC.,
fka MGM GRAND HOTEL, INC., et al,
as to ELIAS GHANEM, THOMAS BYER and
LAS VEGAS MEDICAL CENTERS, only appellees
in lower court, on consolidated appeals
from collateral orders,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF IN OPPOSITION

ALVERSON, TAYLOR, MORTENSEN
& NELSON
ERVIN T. NELSON, ESQ.
DANIEL E. CURRIDEN, ESQ.
600 South Eighth Street
Las Vegas, Nevada 89101
(702) 384-7000
Counsel of Record for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

I

Has petitioner failed to present with accuracy, brevity, and clarity the points requiring consideration by the Court so as to violate Sup. Ct. R. 14.5 and make the grant of certiorari inappropriate here?

II

Here, the Federal District Court held, based on the facts before it, that petitioner should be sanctioned for filing papers which violated Fed.R.Civ.P. 11; that counsel for respondents should not be so sanctioned; and that sanctions petitioner paid into the registry of the court should be released to respondents. Petitioner then appealed from these orders and the court of appeals affirmed the trial court's exercise of discretion. Where the propriety of the trial court's exercise of discretion and the court of appeals' affirmation thereof are the only issues on appeal, is the grant of certiorari appropriate?

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II. This case represents no issues worthy of review by this court on writ of certiorari.... 5

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No. 90-1901

In The

Supreme Court of the United States

October Term, 1991

ESTATE OF KATHLEEN JO PRICE, DECEASED,
JANINE ADAMICK, individually, and
JOSEPH ADAMICK, individually, and
JANICE M. HAYES, Real Party in Interest,

Petitioners,

vs.

BALLY'S GRAND, BALLY'S GRAND, INC.,
fka MGM GRAND HOTEL, INC., et al,
as to ELIAS GHANEM, THOMAS BYER and
LAS VEGAS MEDICAL CENTERS, only appellees
in lower court, on consolidated appeals
from collateral orders,

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court Of Nevada

BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petition for writ of certiorari to the Supreme Court of Nevada that was filed on May 30, 1991, by the petitioner.

STATEMENT OF THE CASE

Petitioner, Janice Hayes (Hayes), counsel for plaintiffs in the trial court, appealed from three separate orders issued by the United States District Court for the District of Nevada in this action. The first, entered July 8, 1987, and based on a detailed report by the federal magistrate to whom the question had been referred (Appendix at 1-21), imposed sanctions upon Hayes personally in the amount of $3,000, payable to defendants below and respondents here, Elias Ghanem, M.D., Thomas Byer, M.D., and the Las Vegas Medical Center (Medical Center defendants). Appendix, at 31-33. Hayes filed a notice of appeal from this and several other orders on August 7, 1987, and eventually deposited $3,000 cash in lieu of a supersedeas bond with the clerk of the court to be held pending resolution of her appeal of the order imposing sanctions. Appendix, at 34-35. Upon receipt of these funds, execution on Hayes for the amount of sanctions was stayed. *Id.*

That appeal was assigned Case No. 87-2575 by the Ninth Circuit Court of Appeals, which issued an order dismissing it in its entirety on April 20, 1989, because most of the orders appealed from were not final (Appendix, at 22). Since this order appeared to allow the district court's imposition of sanctions upon Hayes to stand unmodified, the Medical Center defendants moved for release to them of the funds she had paid into the registry of the court. Hayes responded with a motion for sanctions against both the Medical Center defendants and their counsel, and a motion to strike. By way of an order entered on June 15, 1989, the district court released the

funds paid into its registry to the Medical Center defendants and denied Hayes' motion for sanctions. Appendix, at 23-24. Hayes then took an appeal from the June 15, 1989 order releasing sanctions to the Medical Center defendants. The Ninth Circuit Court of Appeals assigned this appeal No. 89-16462.

On September 1, 1989, in response to Hayes' motion for reconsideration or clarification, the court of appeals entered an order reinstating Case No. 87-2575 insofar as it dealt with the imposition of sanctions on Hayes. Appendix, at 25. While the bulk of the orders Hayes appealed from were not final and appealable, the court found it had jurisdiction to hear an appeal of the order awarding sanctions only. *Id.* The court subsequently consolidated Case No. 87-2575 with Case No. 89-16462. Appendix, at 26-27. The only issues before the court of appeals were thus whether or not the district court's discretion had been properly exercised in imposing sanctions upon Hayes, releasing the amounts she had paid into the registry of the court to the Medical Center defendants, and in denying Hayes' motion for sanctions against counsel for the Medical Center defendants. After receiving the briefs of the parties and hearing their oral argument, the United States Court of Appeals for the Ninth Circuit affirmed the exercises of judicial discretion appealed from in all respects by way of a memorandum order entered on November 21, 1990. Appendix, at 28-29.

After the Circuit Court of Appeals denied Hayes' motion for rehearing and for correction of clerical errors, Hayes filed the instant petition for writ of certiorari seeking review of the November 21, 1990 order.

The district court subsequently entered a final judgment on all claims, in favor of all defendants and against all plaintiffs on February 22, 1989. Appendix, at 30. There has been no appeal from that judgment.

SUMMARY OF ARGUMENT

I. Supreme Court Rule 14.5 requires that the points which petitioner wishes the court to consider be presented with "accuracy, brevity, and clearness." Petitioner has failed to do so in this case, making the grant of certiorari inappropriate.

II. The only issue on appeal here is whether or not the district court properly exercised its discretion as outlined in the Statement of the Case above. The court of appeals had before it all of the facts available to the district court, including copies of the papers of both sides which allegedly violated Fed.R.Civ.P. 11, and found that the district court had properly exercised its discretion. In effect, the instant petition does nothing but ask this court to repeat that analysis in the hopes that it will come to a different conclusion. That a litigant disagrees with the outcome of her lawsuit and appeal is not of itself sufficient reason to grant the writ sought. The petition offers nothing else which might be sufficient and ought, therefore, to be denied.

ARGUMENT

I. THE PETITION FAILS TO PRESENT THE POINTS WHICH PETITIONER WISHES THE COURT TO CONSIDER WITH THE ACCURACY, BREVITY, AND CLARITY REQUIRED BY THE RULES OF THIS COURT.

Sup. Ct. R. 14.5 provides as follows:

> The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

In this regard, the petition speaks most eloquently for itself. Even a thorough reading of it does not inform the reader even of what issues were properly before the court of appeals, much less why review of its decision by writ of certiorari is appropriate. As the rule states, the petition should be denied.

II. THIS CASE PRESENTS NO ISSUES WORTHY OF REVIEW BY THIS COURT ON WRIT OF CERTIORARI.

In Sup.Ct.R. 10, this court has specified those features which a case must present before it will be considered worthy of review by writ of certiorari. The court identified the sort of issues worthy of this kind of review as follows:

> a. When a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted

> and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision.
>
> b. When a state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort or a United States Court of Appeals.
>
> c. When a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with the applicable decisions of this court.

U.S.Sup.Ct.R. 10.1(a) through (c).

Although Hayes fails to make it explicit in her petition, it seems that she is relying on the first two considerations contained in Rule 10. In her petition, Hayes first alleges that there is a conflict between federal circuit courts of appeals necessitating resolution by this court. However, Hayes points to no holding of another circuit court of appeals which in any way conflicts with the holding of the Ninth Circuit being appealed from here. So far as counsel for respondents have been able to ascertain, no such decisions exist.

The petition can also be read to allege actions by the district court and court of appeals which were allegedly so far outside the accepted and usual course of judicial proceedings as to call for an exercise of the court's powers of supervision. However, none of the allegations made by Hayes are supported by citations to the record or anything else. Completely aside from the violation of

this court's rules thus presented, unsubstantiated accusations of judicial malfeasance (even if cogently described, as petitioner's are not) do not provide enough of a foundation to support a writ of certiorari.

When stripped to its essence, the instant petition for certiorari is no more than a statement that Hayes disagrees with the district court's exercise of discretion and the court of appeals' affirmance of that exercise. However, the district court had observed Hayes' conduct in this litigation as well as that of the Medical Center defendants and their counsel, and had before it all of the facts upon which it could base a conclusion that the former was worthy of sanction while the latter was not. The court of appeals had before it the same information and, after reviewing the record and the briefs submitted by the parties, found that the district court's discretion had been properly exercised and so held.

With regard to the release of funds to the Medical Center defendants, the court of appeals held that its own order initially dismissing Appeal No. 87-2575 was reasonably interpreted by the District Court as disposing of the appeal so as to dissolve any stay of execution and allow the sanctions to be released. The instant petition is no more than an invitation for this court to review the very same information and record in the hopes that it might reach a different conclusion. Again, this does not constitute the sort of issue worthy of consideration by this court on a writ of certiorari. Accordingly, the grant of the writ sought is inappropriate here.

———♦———

CONCLUSION

Respondents respectfully urge that the instant petition for writ of certiorari be denied, the petitioner having brought nothing to the attention of the court indicating either that this case represents an unresolved question of law which it should decide or that any action by a lower court was so beyond the usual scope of judicial proceedings that this court is obligated to exercise its supervisory authority.

Respectfully submitted,

ALVERSON, TAYLOR, MORTENSEN
& NELSON
ERVIN T. NELSON, ESQ.
DANIEL E. CURRIDEN, ESQ.
600 South Eight Street
Las Vegas, Nevada 89101
(702) 384-7000
Counsel of Record for Respondents

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ESTATE OF KATHLEEN JO PRICE, etc., et al., Plaintiffs, v. MGM GRAND HOTELS, INC., et al., Defendants.	CV-S-84-447-HDM ORDER (Filed May 22, 1987)

On January 27, 1987, Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER filed a Motion for Sanctions (#154). On March 4, 1987, Defendants' Motion was referred to the undersigned Magistrate for consideration. On March 9, 1987, the undersigned Magistrate ordered Plaintiffs to respond to Defendants' Motion for Sanctions by March 23, 1987 (#166), with which Order Plaintiffs complied (#173). On March 31, 1987, Defendants filed a Reply (#176).

On April 6, 1987, a hearing was held before the undersigned Magistrate and arguments were heard in support of and in opposition to Defendants' Motion for Sanctions (#177).

To put Defendants' Motion for Sanctions now before the Court in proper perspective, a partial review of the procedural history of this case is helpful.

On January 7, 1986, the Honorable Howard D. McKibben heard oral arguments on Defendants' Summary Judgment Motion and granted the Motion from the bench (#68). In the Minutes of the Court filed January 9, 1986, the Court ordered Plaintiffs to amend the Complaint within five days "on the items discussed in open court . . . " (#68).

Plaintiffs filed a Second Amended Complaint (#70) on January 14, 1986, and named all Defendants who had been previously granted Summary Judgments on January 7, 1986, including Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER.

On February 26, 1986, the Court filed its written Order granting Summary Judgment for Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER (#90) on the First Amended Complaint. The Court held that Plaintiffs had no claim under the Rehabilitation Act, Title 29, United States Code, Sections 793-795, and that accordingly, there was no adequate basis to take pendent jurisdiction of Plaintiffs' state law claims. On February 18 through 27, 1986, the Court also filed Summary Judgment Orders and Orders to Dismiss for all other Defendants previously granted Judgments on January 7, 1986 (#83, #84, #85, #86, #87 and #89).

On March 13, 1986, Plaintiffs filed a Motion to Vacate, Amend or Alter Order Entered on February 27, 1986, Granting BYER, GHANEM and LAS VEGAS MEDICAL

CENTER's Motion to Dismiss for Want of Jurisdiction without Prejudice (#98).[1]

Plaintiffs argued that the Court's Order to Dismiss Defendants from the First Amended Complaint was incorrect and that the proper remedy was to permit Plaintiffs to amend their Complaint. Plaintiffs reasoned that since the Plaintiffs had already filed their Second Amended Complaint before the Court's written Order was filed on February 26, 1986, the Defendants should be required to respond to that Complaint (#98, p. 3). On March 20, 1986, Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER filed an Opposition to Plaintiffs' Motion (#101). On May 19, 1986, the Court denied Plaintiffs' Motion to Vacate, Amend or Alter the Order of February 27, 1986 (#108). Other Defendants who had previously been dismissed received similar Orders.

At the same time the Court was considering Plaintiffs' Motion to Amend or Alter the Orders to Dismiss Defendants BYER, GHANEM and LAS VEGAS MEDICAL CENTER (#98), the same Defendants were contending with the Second Amended Complaint filed on January 14, 1986. In response to the Second Amended Complaint, Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER filed a Motion to Strike and Motion for Sanctions (#73) on January 17, 1986.[2]

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[1] Plaintiffs filed similar Motions against all other Defendants who had been granted Summary Judgment or Motions to Dismiss (#95, #96 and #99).

[2] Other Defendants similarly situated also filed Motions to Strike and for Sanctions (#75, #77 and #78).

On February 7, 1986, Plaintiffs filed a Response (#79) and argued that the Second Amended Complaint was properly filed despite the dismissal of the three Defendants from the First Amended Complaint. Plaintiffs contended that at the hearing on January 7, 1986, the Honorable Howard D. McKibben made "inconsistent oral orders" (Response #79, p. 4) in that the Plaintiffs were ordered to amend their Complaint within give days and all the Defendants who were granted Summary Judgment were ordered to prepare Findings of Fact and Order and submit these to the Court also within five days. Plaintiffs argued that the Court's Order did not allow the Plaintiffs time to review the Summary Judgment Order and, therefore, Plaintiffs felt compelled to include the same Defendants in the Second Amended Complaint to reserve their rights against all Defendants. Additionally, Plaintiffs argued that if the Defendants had not been renamed in the Second Amended Complaint, "Plaintiffs would be deprived of their right to seek review in this Court and appellate review of the order granting summary judgment . . . " (#79, p. 6). No case law was cited to support these contentions. By this filing, Plaintiffs also made a Cross Motion for Sanctions against Defendants challenging Defendants' motives in filing Motions to Strike.

On February 14, 1986, Defendants filed a Response (#81). On February 27, 1986, Plaintiffs filed a Reply to the Motion for Sanctions (#93).

On April 28, 1986, the Court granted Defendants BYER, GHANEM and LAS VEGAS MEDICAL CENTER's Motion to Strike all reference to them from Plaintiffs' Second Amended Complaint (#104, p. 2). The accompanying Motion for Sanctions by Defendants was denied.

By its Order of April 28, 1986, the Court also granted the Motions to Strike filed by the other Defendants (#104, p. 2-4). Additionally, Defendant MGM's Motion to Strike (#78) requested that the Court strike from the Second Amended Complaint all claims under the Equal Pay Act, RICO, and Title 42, United States Code, Sections 1983, 1985, and 1986. The Court granted these requests and stated in its Order:

> As to the other claims which this Court now dismisses, Plaintiffs have improperly amended their complaint by adding new claims not originally pled. At the January 7, 1986 hearing, Plaintiffs' counsel was instructed to amend the complaint in order to provide the Court and all parties with a more cogent statement of the causes of action alleged. This Court did not grant Plaintiffs leave to add new claims. Accordingly, the newly added claims based on RICO and 42 U.S.C. Sections 1983, 1985 and 1986 are hereby DISMISSED. As to [the request for sanctions], this Court hereby finds that the conduct of Plaintiffs' counsel is sufficiently egregious to warrant the imposition of sactions (sic). Counsel's (1) refusal to comply with the court-approved stipulation removing "MGM Grand Hotels, Inc. and Certain Subsidiaries" as a proper party defendant, (2) unauthorized attempt to add new claims to the complaint, and (3) improper representation to this Court and counsel for Defendant that Plaintiffs' Equal Pay Act claim had not been voluntarily relinquished and officially dismissed by the Court at the January 7, 1986, hearing have resulted in the unfortunate and unnecessary expenditure of valuable resources by this Court and Defendants' counsel (#104, p. 4).

The Court ordered Plaintiffs' counsel to pay Defendant MGM $200.00 to partially compensate Defendant for the cost of defending Plaintiffs' Motions.

Apparently, the January 7, 1986, hearing before the Court and the Court's Order of February 26, 1986, which dismissed Defendants from the First Amended Complaint and the Court's Order of April 28, 1986, which granted Defendants' Motion to Strike their names from the Second Amended Complaint did not yet convince Plaintiffs that it was procedurally incorrect to include previously dismissed Defendants or to expand the claims for damages in the Second Amended Complaint. Therefore, Plaintiffs filed a Motion to Amend or Vacate the Order entered on April 30, 1986, accompanied with a demand for a hearing (#107).

By their Motion to Amend or Vacate the April 30, 1986, Order, Plaintiffs urged the Court to allow the RICO claims to stand in the Second Amended Complaint. Additionally, Plaintiffs requested the Court Order of April 28, 1986, be amended to permit the Plaintiffs to include Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER and the other dismissed Defendants in the Second Amended Complaint because they were necessary parties to fully litigate the RICO claims (#107, p. 3).

Plaintiffs also urged the Court to reconsider the $200.00 in sanctions granted to Defendant MGM. Plaintiffs argued that Defendant MGM was properly named in the Second Amended Complaint because the Stipulation with MGM on this subject referred only to MGM GRAND HOTELS, INC., and MGM GRAND HOTEL-LAS VEGAS, INC., and it did not refer to "MGM GRAND HOTELS,

INC. and CERTAIN SUBSIDIARIES, INC." Additionally, Plaintiffs stated that they did not recall any stipulation with MGM to dismiss the Equal Pay Act and requested MGM to provide Plaintiffs with a copy of the January 7, 1986, hearing transcript.

Also, Plaintiffs complained that no hearing had been convened regarding the imposition of sanctions as required under Local Rule 13(f) [Rule 100-3, effective July 1, 1986].[3]

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[3] Contrary to Plaintiffs' assertion, such a hearing is not mandated. In *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205 (7th Cir. 1985), the Court reviewed the Advisory Committee Notes and quoted:

> The procedure [of imposing sanctions] obviously must comport with due process requirements. The particular format to be followed should depend on the circumstances of the situation and the severity of the sanction under consideration. In many situations the judge's participation in the proceedings provide him with full knowledge of the relevant facts and little further inquiry will be necessary.

In the instant case, a hearing was convened on January 7, 1986, to hear arguments on Defendants' Summary Judgment Motions and at that time Plaintiffs were directed to file a Second Amended Complaint which would reflect the discussions had in open Court. Following the filing of the Second Amended Complaint (#70), the Court was inundated with Motions, Countermotions and Responsive Pleadings which detailed the ongoing concerns of all the parties. When the Court ordered Defendants' names to be stricken from the Second Amended Complaint (#104), the Court determined that Plaintiffs had, contrary to the directions of the Court during the Summary Judgment hearing, pled new causes of action. Accordingly, the Court had all the necessary information before it and a hearing would have served no useful purpose. *Rodgers v. Lincoln Towing Service, Inc., supra,* at 205.

Plaintiffs' last argument for reconsideration of the April 28, 1986 Order centered on the number of Motions which were heard by the Court at the hearing regarding the Summary Judgment Motion held on January 7, 1986, stating at p. 4:

> Plaintiffs also point out that they did not 1have (sic) a fair chance to present their arguments at the hearing on six motions for summary judgment.
>
> This court caused all six to be scheduled for the same time, or perhaps it was five, whereas the local rules provide that each side shall have 30 minutes to argue each motion.
>
> In addition, the court granted the last minute request of Andrew Brignone, Esq. that the time of the hearing be changed to 5 p.m. so that he could be present, although he was not the attorney who had been handling the case, but was apparently his supervisor.

On May 27, 1986, Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER filed their Opposition (#109). Additionally, apparently motivated by Plaintiffs' predeliction to object to every Court Order dismissing Defendants, the Defendants requested the Court "for an order prohibiting Plaintiffs from filing additional motions pertaining to these Defendants in this litigation." (#109, p. 2). On June 9, 1986, Plaintiffs filed their Reply and Opposition to Defendants' Motion for an Injunction and for Sanctions (#111).

On September 11, 1986, the Honorable Howard D. McKibben conducted a hearing on the aforementioned Motions. Both Plaintiffs' Motion to Amend or Vacate the

Defendant MGM's Countermotion for Sanctions were denied (#114).

The Court's denial of the Motion to Amend or Vacate the Order of April 30, 1986, affirmed a $200.00 sanction levied against Plaintiffs (#104). Since the Plaintiffs had exhausted all avenues of appeal at the District Court level, an appeal to the Ninth Circuit was initiated by Plaintiffs on the issue of the $200.00 sanction award.

The Court's Order denying Plaintiffs' Motion to Vacate the award of the $200.00 sanction was entered on September 11, 1986, which allowed Plaintiffs thirty days to appeal, by October 11, 1986. On November 10, 1986, Plaintiffs filed a Motion for Extension of time to File Notice of Appeal Pursuant to Rule 4(a) of the Federal Rules of Apellate (sic) Procedure (#121). Plaintiffs *concurrently* filed a Notice of Appeal (#122).

On November 25, 1986, Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER filed an Opposition to the Extention of Time to file Notice of Appeal (#127). On December 18, 1986, Plaintiffs filed their Reply (#135).

On December 23, 1986, the undersigned Magistrate denied Plaintiffs' Motion for an Extension of Time to File Notice of Appeal (#138). On January 9, 1987, Plaintiffs filed Objections to this Order and Motion to Quash and Vacate Magistrate's Order (#146) arguing that a Motion for Extension of Time to File Notice of Appeal is not a pretrial matter, but rather a final Order which the Magistrate may not hear. Also, the parties did not given written consent to proceed before the Magistrate. This Objection is currently under submission to the District Court.

After Plaintiffs filed the Notice of Appeal on November 10, 1986, Plaintiffs argued that the litigation was stayed until the appeal of the Order for $200.00 sanctions was decided by the Ninth Circuit. To put this argument before the Court, on December 24, 1986, Plaintiffs filed an Ex Parte Motion for a Stay of Proceedings, except Disposition of Motion to File Late Notice of Appeal, Pending Resolution of Appeal, and Motion to Vacate Orders Entered after Notice of Appeal was filed (#140).

By their Motion, Plaintiffs argued that the filing of a Notice of Appeal divested the District Court of jurisdiction to proceed. Therefore, the District Court was asked to vacate any and all Court Orders issued after Plaintiffs filed a Notice of Appeal on November 10, 1986.[4]

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[4] Plaintiffs specify in their Motion the following Court Orders to be vacated:

1. Magistrate Pro's November 12, 1986 Order substituting BALLY GRAND INC. and denying extension of discovery (#125). Motion was denied, Order Adopting Magistrate's Recommendation (#157); but now pending, Plaintiffs' Motion to Clarify and Supplement Order or, in the Alternative, to Amend or Alter Order (#163); and

2. The Court Order dealing with TRANSAMERICA's Certification of Final Judgment filed on December 5, 1986 (#129); Denied, Judgment on Decision by the Court (#152), filed January 26, 1987. Plaintiffs then filed a Motion to Correct Order of January 26, 1987 Nunc Pro Tunc to Reflect that Action is Dismissed on Merits as to Defendant TRANSAMERICA Only, or in the Alternative, Motion to Amend or Alter Order and for Additional Findings of Fact and Conclusions of Law (#161). On March 12, 1987, the Court filed a limited Amended Order (#169).

On December 30, 1986, the undersigned Magistrate determined that the Court could not consider Plaintiffs' Motion on an Ex Parte basis and Ordered Plaintiffs to serve the Motion on the Defendants (#139). On January 2, 1987, Plaintiffs filed and served the aforementioned Motion (#140).

On January 7, 1987, the undersigned Magistrate denied Plaintiffs' Motion to Stay Proceedings and Motion to Vacate Orders Entered After Notice of Appeal was Filed (#143) and the undersigned Magistrate attached to the Order a memorandum of the Court regarding proper format for ex parte motions.

After filing the Motion for a Stay of Proceedings, Plaintiffs refused to respond to pending Motions unless so ordered by the Court arguing that the Court was divested of jurisdiction. Also, to preserve this issue for appeal, Plaintiffs' responses were always prefaced with objections. Accordingly, Plaintiffs made the following Motions:

1. On November 26, 1986, Plaintiffs filed an Ex Parte Motion for Extension of Time to File Pretrial Memorandum, Without Waiving Objection that the Court has been Divested of Jurisdiction (#127A). Motion was denied on December 18, 1986, by undersigned Magistrate; parties ordered to file Joint Pretrial Order on or before January 16, 1987 (#136);

2. On December 18, 1986, Plaintiffs' Motion to Amend or Vacate the Order Entered on December 5, 1986 Certifying the Order Granting TRANSAMERICA INSURANCE COMPANY's Motion to Dismiss as a Final Judgment under F.R.C.P. 54(b) (#137);

3. On January 7, 1987, Plaintiffs filed an Ex Parte Motion to Quash or Vacate Magistrate's Order Entered on December 18, 1986 for Want of Jurisdiction, or alternatively, Objections to Magistrate's Order (#144); On March 12, 1987, the Court filed an Order Adopting Magistrate's Order (#171) and clearly delineated the jurisdiction of the Magistrate and ordered that a Joint Pretrial Memorandum be filed by April 10, 1987. However, on March 31, 1987, Plaintiffs filed an Ex Parte Motion to Amend, Alter or Vacate Order of March L2 (sic), 1987 as (1) an Appeal is Pending Before the Court of Appeals and Neither the Magistrate nor Judge has jurisdiction, and (2) this Court has not Ruled on the Motion to Stay Proceedings Which is Unopposed (#174) which is now pending.

4. On January 9, 1987, Plaintiffs filed a document entitled:

> I. Plaintiffs' Reply to MGM Defendants' Opposition to Ex Parte Motion, with Notice to Other Parties, for extension of time to File Parties' Joint Pretrial Memorandum, Made Without Waiver of Plaintiffs' contention that Court has no Jurisdiction to Conduct Further Proceedings
>
> II. Plaintiffs' Motion to Strike MGM's Opposition
>
> III. Plaintiffs' Motion for Sanctions, Made Without Waiver of Contention that this Court Lacks Jurisdiction (#145).

This Motion is now pending.

5. On January 9, 1987, Plaintiffs also filed Plaintiffs' Ex Parte Motion *With Notice to Parties,* to Quash and Vacate Magistrate's Order of December 23, 1986, for Want of Jurisdiction and Consent, or in the Alternative, Objections to

Magistrate's Order, Without Waiver of Plaintiffs' Contentions Re Jurisdiction of Court (#146). This Motion is now pending.

6. On January 22, 1987, Plaintiffs' Ex Parte Motion, *With Notice to Parties*, to Vacate Magistrate's Order of January 7, 1987, for Want of Jurisdiction, or Alternatively, Objections to Magistrate's Order and Request for Findings of Fact (#151). This Motion is now pending.

Plaintiffs' attempts to perfect an appeal to the Ninth circuit regarding the Court's Order of $200.00 in sanctions against Plaintiffs caused considerable expenditure of resources for the Defendants and the court. Defendant MGM, the Defendant awarded the $200.00 sanctions, filed a Disclaimer of Interest with the Court on February 13, 1987, in an attempt "[t]o avoid further delays in the orderly resolution of this case." (#158, p. 2).

However, this effort had little effect on Plaintiffs. On March 3, 1987, Plaintiffs filed Objections to "MGM Disclaimer of Interest in Sanction Award" (#164). Plaintiffs' Objections included the following:

1. There is no Order from the District Court stating that said sanction was not awarded or has been stricken and MGM has not sought such relief from the Court.

2. The sanction was imposed because Plaintiffs (1) included "MGM Grand Hotels, Inc." and "MGM Grand Hotels and Certain Subsidiaries" as Defendants in their Second Amended Complaint and (2) because Plaintiffs included claims under the Civil Rico Act in their Complaint.

3. An imposition of sanctions for civil contempt is an immediately appealable Order as is an award of sanctions against an attorney.

> 4. MGM has not proposed that Plaintiffs be allowed to include the new claims, the stricken Defendants and responses to the Second Amended Complaint by all Defendants.
>
> 5. MGM's "disclaimer" was filed in bad faith for the sole purpose of attempting to defeat the jurisdiction of this Court and deprive appellants of the opportunity to fully litigate their claims.
>
> 6. MGM has not tendered payment of the $200.00 which Plaintiffs have paid to it.
>
> (#164, Ex. 1, p. 3).

Plaintiffs' perception of the extent of sanctions exceeded the $200.00 ordered by the Court. The papers filed with the Court indicate that Plaintiffs would accept the disclaimer of Interest filed by Defendant MGM only if Plaintiffs were allowed to maintain the Second Amended Complaint as originally filed. This, of course, would contradict the Order of the Court.

On March 12, 1987, Defendant BALLY filed its Response (#168). Attached was a letter (Exhibit A) indicating that the $200.00 sanction was returned to Plaintiffs.

On March 31, 1987, Plaintiffs filed their Reply (#175), which again delineated Plaintiffs' belief that the Second Amended Complaint should include the additional federal claims and name all dismissed Defendants. No case law was cited in support of this contention. Plaintiffs argued that the award of sanctions was for "including the Equal Pay Claims in the Second Amended Complaint of Right. As Plaintiffs have shown, removal of the Equal Pay claims will also remove the jurisdictional predicate permitting the filing of Plaintiff's original Complaint, and thus extinguish all of Plaintiffs' claims under that Act and

Title VII of the Equal Rights Act." This Motion is now pending.

By their Motion for Sanctions (#154) now before the Court, Defendants contend that Plaintiffs have repeatedly attempted to circumvent the Orders of this Court by filing Motions interposed to delay the dismissal of Defendants from this litigation. Defendants seek sufficient Rule 11 sanctions "to avert any further protraction of Defendants' involvement in this case." (#154, p. 60).

With objections as to the jurisdiction of the Court, Plaintiffs responded to the Motion for Sanctions (#173) pursuant to the undersigned Magistrate's Order (#166). Additionally, Plaintiffs contend that the Court has not ruled on other Motions before the Court and, therefore, ruling on the Motion for Sanctions is inappropriate.

Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. . . . The signature of an attorney . . . constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the

> court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

Subjective bad faith is not necessary to impose sanctions under Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir. 1986); *Orange Production Credit Association v. Frontline Ventures Limited*, 792 F.2d 797, 800 (9th Cir. 1986). Rather, sanctions under Rule 11 are appropriate when a pleading which has been filed is "so without factual and legal foundation that it can be considered frivolous or unreasonable." *Zaldivar v. City of Los Angeles*, 590 F.Supp. 852, 857 (C.D. Cal. 1984); *See also Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537-38 (9th Cir. 1986); *Zaldivar*, 780 F.2d at 831; *Orange Production*, 792 F.2d at 800. "If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively reasonable and vexatious." *In re TCI Ltd.*, 769 F.2d 441, 445 (7th Cir. 1985). The Seventh Circuit further stated, "litigation must be grounded in an objectively reasonable view of the facts and the law. If it is not, the lawyer who proceeds recklessly – not his innocent adversaries – must foot the bill." *Id.* at 450.

The Advisory Committee Note accompanying the 1983 Amendment of Rule 11 instructs the Court to "test the signer's conduct by inquiring what was reasonable to

believe at the time the pleading was submitted." Hindsight is an inappropriate guideline. *Zaldivar, supra,* 780 F.2d at 830-31.

The *Zaldivar* Court defined "harassment" as an act which does

> more than in fact both, annoy or vex the complaining party. Harassment under Rule 11 focuses upon the improper purpose of the signer, objectively tested, rather than the consequences of the signer's act, subjectively viewed by the signer's opponent. . . . Without question, successive complaints based upon propositions of law previously rejected may constitute harassment under Rule 11.
>
> *Id.* at 832.

A review of the case file in the instant litigation is a monumental task, complicated by the numerous motions filed by Plaintiffs to review Court Orders. Motions to review must be reasonable and supported by propositions of law.

> Rule 11 requires counsel to study the law before representing its contents to a federal court. An empty head but a pure heart is no defense. The Rule requires counsel to read and consider before litigating. Counsel who puts the burden of study and illumination of the defendants or the court must expect to pay attorneys' fees under the rule. . . . The test under Rule 11 is objective. . . . The point, rather, is that every lawyer must do the necessary work to find the law *before* filing the brief. It is not acceptable to make an assertion of law and hope that it will turn out to be true.

Thornton v. Wahl, 787 F.2d 1151, 1154 (7th Cir. 1986) (citations omitted) (emphasis in original).

Plaintiffs were instructed in open court on January 7, 1986, to file a Second Amended Complaint to provide the Court and parties with a clearer statement of the causes of action. At this same hearing, Plaintiffs' counsel addressed the Court and then heard the Court order Summary Judgments and Orders for dismissal on behalf of Defendants. At this juncture, Defendants GHANEM, BYER and LAS VEGAS MEDICAL CENTER could have reasonably believed that they were no longer parties to this litigation. Plaintiffs, by various Motions to the Court, have caused Defendants to continue in the litigation for an additional fourteen months.

On January 14, 1986, seven days after the Court had dismissed Defendants, Plaintiffs filed their Second Amended Complaint and named the Defendants again, alleging the same charges and adding other Federal charges. This filing clearly violated the Court's Order of January 7, 1986, as to the parties and the causes of action.

The Court later granted Defendant's Motion to Strike, again removing Defendants from the litigation. Plaintiffs filed Motions to Vacate or Amend the Order granting the Motion to Strike and, thereby, caused Defendants to continue with this litigation. Defendants had to file responsive pleadings to all the Plaintiffs' Motions causing considerable expenditure of time and money.

Rule 11 does not require a hindsight review of the filings. Therefore, the fact that Plaintiffs' Motions have yet to prevail before the District Court is not determinative of the issue of sanctions. The standard by which these filings are to be judged is an objective standard at

the time of the filing. *Zaldivar, supra,* 780 F.2d 823, 829 (9th Cir. 1986).

At issue is whether counsel for Plaintiffs made appropriate inquiry of the facts and the law before filing the Second Amended Complaint, the numerous Motions to Vacate or Amend Court Orders, and using the Notice of Appeal which was not timely filed to frustrate the efforts of the parties and the Court from going forward with this litigation.

Counsel for Plaintiffs made no record either in writing or orally during the hearing before the undersigned Magistrate regarding the types of research which was completed before initiating the aforementioned actions. Plaintiffs' Points and Authorities filed in support of the Motions and responsive pleadings cited no case law support for the Motions, but simply reiterated the Plaintiffs' reasons for continuing to insist that the parties and the causes of action pled in the Second Amended Complaint were necessary to the resolution of Plaintiffs' claims.

Plaintiffs also complain that the refiling of the Complaint within five days allowed insufficient time to evaluate the papers which Defendants were ordered to submit to the Court regarding their dismissals. This argument is not credible because counsel for Plaintiffs was present when the Court orally granted the dismissals of Defendants and directed Defendants to file papers with the Court. Counsel for Plaintiffs participated in the hearing before the District Court on January 7, 1986, and cannot now argue that the Second Amended Complaint improperly named Defendants and enlarged the causes of action because she was concerned about the contents of the

Defendants' dismissal papers. Counsel particpated [sic] and heard the Court's decision. Defendants were ordered to put the decision in a written format, not decide the issue or determine its scope. Plaintiffs' counsel has not persuaded the Court that Order to refile the Complaint within five days was not sufficient time.

The Ninth Circuit has evaluated the impact of a Summary Judgment ruling and objection to such a ruling.

> It is obvious from the text of the Rule that the pleader need not be correct in his view of the law. Thus the granting of a motion to dismiss the complaint for failure to state a claim, or the granting of a summary judgment against the pleader is not dispositive of the issue of sanctions. The pleader, at a minimum, must have a "good faith argument" for his or her view of what the law is, or should be. A good faith belief in the merit of a legal argument is an objective condition which a competent attorney attains only after "reasonalbe inquiry." Such inquiry is that amount of examination into the facts and legal research which is reasonable under the circumstances of the case. Of course, the conclusion drawn from the research undertaken must itself be defensible. Extended research alone will not save a claim that is without legal or factual merit from the penalty of sanctions.
>
> *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 830-31 (9th Cir. 1986).

The actions of counsel for Plaintiffs leads to only one conclusion – sanctions under Rule 11 are appropriate. The Court finds that counsel for Plaintiffs has pursued "a path that a reasonably careful attorney would have

known, after appropriate inquiry, to be unsound." *In re TCI Ltd., supra.*

Accordingly, the Court finds that Plaintiffs' counsel has violated Rule 11 and awards $1,000.00 in sanctions to be paid by Plaintiffs' counsel, Janice Hayes, to Defendant GHANEM, $1,000.00 to Defendant BYER and $1,000.00 to Defendant LAS VEGAS MEDICAL CENTER, such sanctions to be paid on or before June 12, 1987.

IT IS SO ORDERED.

DATED: May 21, 1987

/s/ Philip M. Pro
PHILIP M. PRO
United States Magistrate

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESTATE OF KATHLEEN JO PRICE, et al., Plaintiffs-Appellants, vs. BALLY'S, formerly known as MGM, INC., and MGM GRAND HOTELS, INC., et al., Defendants-Appellees.	No. 87-2575 DC# CV-84-447-HDM Nevada (Las Vegas) ORDER (Filed April 20, 1989)

Before: WALLACE, ALARCON and NORRIS, Circuit Judges

Due to a defect in the Fed. R. Civ. P. 54(b) certification, this appeal was filed prematurely. Orders whose finality normally would depend upon a Rule 54(b) certification may be treated as final when the case has subsequently been reduced to final judgment. *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981). Here, the district court entered the final judgment February 23, 1989. However, the court is informed that plaintiffs filed a timely post-judgment motion for reconsideration. Thus, jurisdiction remains in the district court. Accordingly, this appeal is dismissed.

MoCal 4/17/89
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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ESTATE OF KATHLEEN JO PRICE etc., et al., Plaintiff, v. BALLY'S, INC., et al., Defendants.	CV-S-84-447-PMP ORDER (Filed June 15, 1989)

The Court having read and considered Defendants' Motion for Release of Funds (#354), filed May 3, 1989, on behalf of Elias Ghanem, M.D., Thomas Byer, M.D., and Las Vegas Medical Center, Plaintiff's Response in opposition thereto and Countermotion to Strike and for Sanctions (#359), filed May 22, 1989, and Defendants' Reply (#365), filed June 9, 1989, and good cause appearing,

IT IS ORDERED that Motion for Release of Funds (#354), filed on behalf of Defendants Ghanem, Byer and the Las Vegas Medical Center (#354), is granted, and the Clerk of Court shall forthwith release to Alverson, Taylor and Mortensen, Attorneys at Law, for the benefit Defendants Elias Ghanem, M.D., Thomas Byer, M.D., and the Las Vegas Medical Center, the $3,000.00 deposited with the Clerk of Court deposited by Janice Hayes, Esq., on January 11, 1989, in satisfaction of this Court's Order awarding sanctions (#220) entered July 10, 1987.

IT IS FURTHER ORDERED that Plaintiff's Motion to Strike and for Sanctions (#359) is denied.

DATED: June 15, 1989

/s/ Philip M. Pro
Philip M. Pro
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF KATHLEEN JO PRICE, et al., Plaintiffs-Appellants, vs. BALLY'S, formerly know as MGM, Inc., and MGM GRAND HOTELS, INC. et al., Defendants-Appellees.	No. 87-2575 DC# CV-84-447-HDM Nevada (Las Vegas) ORDER (Filed Sep. 1, 1989)

Before: WALLACE, ALARCON and NORRIS, Circuit Judges

The motion for clarification is granted. In this appeal appellants sought review of, *inter alia*, the district court order of July 8, 1987 which imposed sanctions against appellants' counsel. An immediate appeal of this order was required because the order was final. *See Mesirow v. Pepperidge Farm, Inc.*, 703 F.2d 339, 345 (9th Cir. 1983). However, the district court had not yet entered an order disposing the appellants' timely motion for reconsideration. Hence, we lacked jurisdiction over the remaining issues. *See* Fed. R. Civ. P. 4(a)(4). Accordingly, this appeal is reinstated as to the July 8, 1987 sanctions order only.

Appellants shall file a new opening brief limited to the issues raised by the sanctions order within 30 days of the date of this order. Upon entry of this order, the Clerk shall set the balance of the briefing schedule.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ESTATE OF KATHLEEN JO PRICE, deceased, et al.,	)	Nos. 87-2575 89-16462
Plaintiffs/Appellants,	)	DC# CV-84-447-HDM
vs.	)	Nevada (Las Vegas)
NEVADA RESORT ASSOCIATION, et al.,	)	ORDER (Filed March 9, 1989)
Defendants/Appellees.	)	

Appellants' motion to file the civil appeals docketing statement for No. 89-16462 late is granted. The docketing statement previously received shall be filed.

Appellants' motions to file her opening briefs late are granted. The opening briefs received January 31, 1990 in No. 87-2575 and January 19, 1990 in No. 89-16462 shall be filed. The district court states the certificate of record for No. 89-16462 will be issued forthwith.

Although separate opening briefs have been filed in these appeals, the motion of appellee Ghanem, et al., to consolidate Nos. 87-2575 and 89-16462 is granted. All answering briefs are now due March 21, 1990. Appellees shall endeavor to comply with Ninth Cir. R. 28-4. The reply brief is due April 4, 1990.

This order is subject to reconsideration by a judge if any objection is filed within ten (10) days of the entry of the order.

For the Court:

Cathy A. Catterson
Clerk of the Court

/s/ Cole Benson
Cole Benson
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESTATE OF KATHLEEN JO PRICE, deceased; JANINE ADAMICK; JOSEPH ADAMICK, Plaintiffs-Appellants, vs. NEVADA RESORT ASSOCIATION; TRUSTEES OF NEVADA RESORT ASSOCIATION HEALTH AND WELFARE TRUST; ELIAS GHANEM; BALLY'S formerly known as MGM, INC. and MGM GRAND HOTELS, INC.; METROPOLITAN LIFE INSURANCE COMPANY; THOMAS BYER; MGM GRAND HOTELS AND CERTAIN SUBSIDIARIES; TRANSAMERICA OCCIDENTAL LIFE INSURANCE COMPANY; LAS VEGAS MEDICAL CENTER, Defendants-Appellees.	Nos. 87-2575 89-16462 D.C. No. CV-84-447-HDM D.C. No. CV-84-477-PMP MEMORANDUM* (Filed Nov. 21, 1990)

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding
Philip M. Pro, District Judge, Presiding
Argued and Submitted November 7, 1990
San Francisco, California

Before: BROWNING, PREGERSON, and TROTT, Circuit Judges.

Janice Hayes, attorney for the estate of Kathleen Jo Price, appeals the district court's orders (1) imposing Rule 11 sanctions against her in the amount of $3,000, (2) denying her motions for sanctions against Elias Ghanem, Thomas Byer, and the Las Vegas Medical Center (collectively the Medical Defendants), and (3) releasing the bond Hayes posted to obtain a stay pending her appeal of the order imposing sanctions against her. We affirm.

The district court did not abuse its discretion in imposing sanctions against Janice Hayes based on her numerous filings of frivolous papers. *See Cooter & Gell v. Hartmax Corp.*, 110 S.Ct. 2447, 2461 (1990). The court also acted within its discretion in refusing to award sanctions against the Medical Defendants. Hayes has not pointed to any conduct of the Medical Defendants that would justify the imposition of sanctions against them. Finally, the court did not err in releasing the bond given by Hayes pending her appeal (no. 87-2575) of the order imposing sanctions against her because on April 20, 1989, a panel of this court dismissed the appeal.

AFFIRMED.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

ESTATE OF KATHLEEN JO PRICE etc., et al., Plaintiff, v. BALLY'S, INC., et al., Defendants.	CV-S-84-447-PMP ORDER (Filed Feb. 22, 1989)

Pursuant to the Court's Order of January 11, 1989 (#323), the parties to this action have submitted status reports to the Court regarding the issues of whether, and to what extent, further Judgments must be entered in this case to finalize all proceedings and enable Plaintiff to perfect appropriate appeals. (Documents #326, #330, #331, #333 and #334.) The Court having read the status reports submitted, and in accordance with the provisions of Rule 58 of the Federal Rules of Civil Procedure,

IT IS ORDERED that the Clerk of Court shall forthwith enter Judgment in favor of Defendants and against Plaintiffs in accordance with the Court's Order Dismissing this action entered August 10, 1988 (#305).

DATED: February 21, 1989

/s/ Philip M. Pro
Philip M. Pro
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ESTATE OF KATHLEEN JO PRICE, deceased, by its administratrix, Janine Adamick; JANINE ADAMICK, individually; and JOSEPH ADAMICK, individually,

Plaintiffs,

v.

BALLY'S GRAND, INC.; METROPOLITAN LIFE INSURANCE CO., a New York insurance corporation; and DOES I-X, inclusive,

Defendants.

CV-S-84-447 HDM

ORDER ADOPTING MAGISTRATE'S ORDER

(Filed July 8, 1987)

On May 21, 1987, following a hearing at which arguments were heard in support of and in opposition to defendants, Ghanem, Byer and Las Vegas Medical Center's motion for sanctions, document number 154, United States Magistrate Philip M. Pro entered an order imposing sanctions in the amount of $3,000.00 against Janice M. Hayes, counsel for plaintiffs. Document number 193. Plaintiffs filed objections to the Magistrate's Order on June 5, 1987. Document number 198. Having considered the above-referenced pleadings, memoranda of the parties, and other relevant and timely filed matters of record, and having made a *de novo* review and determination in accordance with the requirements of 28 U.S.C. § 636 and the applicable case law, *e.g.*, *Campbell v. United States District Court*, 501 F.2d 196, 206 (9th Cir. 1974), that the

Magistrate's Order is correct and not contrary to law, the Court hereby

AFFIRMS the Order of the United States Magistrate designated above (#193), and DENIES and OVERRULES plaintiffs' opposition and objections (#198). Accordingly,

IT IS ORDERED that plaintiffs' counsel, Janice M. Hayes, shall pay $1,000.00 in sanctions to defendant Ghanem, $1,000.00 in sanctions to defendant Byer, and $1,000.00 in sanctions to defendant Las Vegas Medical Center. After reviewing the numerous pleadings, motions, and other papers filed by plaintiffs' counsel in this case, the Court agrees with the Magistrate that most of these documents are so without factual and legal foundation as to be considered "frivolous or unreasonable." *Zaldivar v. City of Los Angeles*, 590 F. Supp. 852, 857 (C.D. Cal. 1984); *see also Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1537-38 (9th Cir. 1986); *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 831 (9th Cir. 1986); *Orange Production Credit Association v. Frontline Ventures Limited*, 792 F.2d 797, 800 (9th Cir. 1986). By filing such meritless motions, plaintiffs' counsel has forced defendants Ghanem, Byer and Las Vegas Medical Center to continue as parties in this litigation, incurring substantial costs, for more than fourteen months after they were dismissed by order of the Court. Plaintiffs' counsel has provided no justification for pursuing such a course of action – one which "a reasonably careful attorney would have known, after appropriate inquiry, to be unsound." *In re TCI Limited*, 769 F.2d 441, 445 (7th Cir. 1985); *see also Thornton v. Wahl*, 787 F.2d 1151, 1154 (7th Cir. 1986). Therefore, the Court concludes that Rule 11 sanctions are appropriate.

IT IS SO ORDERED.

DATED this 8th Day of July, 1987.

/s/ D. McKibben
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
LAS VEGAS, NEVADA

ESTATE OF KATHLEEN JO PRICE, etc., et al., Plaintiffs, vs. MGM GRAND HOTELS, INC., et al., Defendants.	Civil-S- 84-447-PMP MINUTES OF THE COURT Dated: December 16, 1987

PRESENT:

THE HONORABLE HOWARD D. McKIBBEN
UNITED STATES DISTRICT JUDGE

DEPUTY CLERK: PRESTON BLUIETT, JR.

REPORTER: HAROLD ST. THOMAS

COUNSEL FOR PLAINTIFF(S): JANICE M. HAYES

COUNSEL FOR DEFENDANT(S): ANDREW S. BRIGNONOE for MGM, Nevada Resort Association; Burton Cohen and Arlene Sondgeroth; BRYAN K. GOULD for Byer, Ghanem & Las Vegas Medical Center; JOHN P. FOLEY for Metropolitan Life Insurance; and Gloria J. Sturman for Transamerica Occidental Life.

MINUTE ORDER IN CHAMBERS_____

IN COURT PROCEEDINGS: ORAL ARGUMENT ON:

1. RECONSIDERATION OF THE PLAINTIFFS' MOTION FOR STAY (#241 ENTITLED: Ex

Parte Motion . . . to Vacate Order, etc.), filed August 19, 1987;

2. DEFENDANT BALLY'S MOTION FOR ALLOWANCE OF ATTORNEYS' FEES UNDER TITLE VII (#240), filed August 14, 1987; and

3. THE MEDICAL CENTER DEFENDANTS' MOTION TO REQUIRE BOND (#248), filed September 9, 1987.

9:31 a.m. court convenes.

After hearing the arguments of counsel. IT IS ORDERED that the Plaintiffs' Application for a Stay Pending Appeal is granted provided that, within fifteen (15) days from this date, the Plaintiffs post with the Clerk of this Court a surety bond or cash in the amount of $3,000.00. IT IS FURTHER ORDERED that Defendant Bally will be allowed attorneys' fees in the sum of $3,500.00. Bally's counsel is directed to prepare and submit a proposed final judgment for the Court's approval.

CLERK, U.S. DISTRICT COURT

By: /s/ Preston Blviett, Jr.
Preston Blviett, Jr.

9:57 a.m. adjournment.

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Supreme Court, U.S.
FILED
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No. 90-1901

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

JANICE M. HAYES,
Real Party In Interest,

Petitioner,

v.

THOMAS BYER, ELIAS GHANEM and
LAS VEGAS MEDICAL CENTERS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF

JANICE M. HAYES
Attorney At Law
3391 S. El Camino Road
Las Vegas, Nevada 89102
(702) 871-5135
Counsel For Petitioner

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

Janice M. Hayes, the Petitioner, respectfully submits this reply brief to the brief in opposition.

REPLY BRIEF

The respondents may not, in a technical sense, have raised any issues for the first time in their brief in opposition pursuant to Supreme Court Rule 15.6, but they intentionally presented many material misstatements, which which could affect this court's determination and which petitioner respectfully suggests may be sufficient cause for this court to consider disciplinary action under Supreme Court Rule 8.2, and to allow petitioner to file this Reply Brief.

(1) On the cover and also on page 1 of their brief in opposition and in the opening paragraph, respondents state that the court's term is 1991, whereas it is, of course, 1990, and that the petition for writ of certiorari is to the "Supreme Court of Nevada," whereas it is to the United States Court of Appeals

for the Ninth Circuit.

(2) Respondents further this deception by stating on page 6 that "it seems that Hayes is relying on the first two considerations contained in Rule 10." United States Supreme Court Rule 10.1(b) refers to situations where a state court has decided a federal question in a way that conflicts with a decision of another state court of last resort or a United States court of appeals.

The instant action was filed in a federal court and was thus never before the Nevada Supreme Court.

(3) Respondents falsely state on page 1 in their opening paragraph that the petition for writ of certiorari was filed on May 30, 1991, whereas they well know that the petition was timely filed on May 24, 1991, pursuant to an extension of time granted by the Honorable

Sandra Day O'Connor, and that the Clerk would not otherwise file it.

(4) Respondents have entitled their brief, Estate of Kathleen Jo Price, Deceased, et al. v. Bally's Grand, et al., although they were advised by petitioner that the Clerk of this Court instructed her that the case caption should be: Janice M. Hayes v. Thomas Byer, et al.

One edition of the U.S. Law Week lists the title as first stated, while another edition lists it as Hayes v. Byer.

(5) Respondents imply at page 7 of their brief that petitioner presented "accusations of judicial malfeasance," as to judges of the district court and the court of appeals.

Hayes did not. She presented arguments that the district court erred in entering three separate orders with

Rule 54(b) certifications wherein the court omitted the requisite phrase that "there is no just reason for delay," from which Hayes as counsel was compelled to take appeals and to ask the court of appeals to dismiss said appeals for want of an appealable order.

The court of appeals erred in not immediately dismissing said appeals, and Hayes was forced to file unnecessary and futile Docketing Statements and briefs, No. 87-1941 as to defendant Transamerica, 87-2309, as to the Ghanem defendants, and part of 87-2575, as to defendants Trustees of the Nevada Resort Association Health And Welfare Trust, as set out in the petition herein.

(6) Respondents were dismissed for want of subject matter jurisdiction, and not on the merits. There was a stayed state court action, wherein the state court also dismissed claims

the respondents herein for want of subject matter jurisdiction, creating an anomalous situation in which neither court dismissed on the merits, which leaves Hayes's clients without a remedy as to these defendants.

The state court action was filed after a Special Administratrix had been appointed, and thus no issue of substitution arose therein.

The federal district court never reviewed its defective dismissal for want of subject matter jurisdiction after the court of appeals dismissed No. 87-2309, pertaining to respondents herein although they were not named in the Order, Pet. 12a., entered on May 2, 1988, after the instant appeal, No. 87-2575, was filed.

As petitioner relates hereafter,

the issue of proper substitution of a deceased party is a recurrent one in this and two other pending cases in which Hayes is counsel, with conflicting orders of the district court and conflicting orders of the court of appeals in different cases.

II

The petitioner respectfully suggests the rules of this court and especially the intent and spirit of Supreme Court Rule 15.1, governing briefs in opposition to a petition for a writ of certiorari have been completely and intentionally ignored by the respondents, as set forth at pages 2, 3 and 4 herein.

The fact that respondents made such obvious and silly misstatements as to the proper lower court, the term of this court and that Hayes is allegedly

petitioning from a a non-existent state court action and order, suggest that respondents are relying on a purported lack of jurisdiction in the lower courts as to plaintiff Estate Of Kathleen Jo Price, Deceased, the lead plaintiff.

Supreme Court Rule 15.1 admonishes respondents that they have an obligation to the court to point out any perceived misstatements in the brief in opposition, and not later.

The only exception is want of jurisdiction. Rule 15.1 provides that "Any defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to attention of the Court by the respondent in the brief in opposition."

In the instant case, petitioner relied on the statement made by District JUdge Howard McKibben, in denying the

motion of defendants other than the respondents to dismiss the action because plaintiffs had not moved to substitute the Estate Of Kathleen Jo Price in their (First) Amended Complaint, filed due to Price's death, as a party, that said omission was a "procedural defect," and not a jurisdictional one, which could be waived by the court. No defendant challenged this oral order, which is in the transcript of the hearing.

When plaintiffs filed the Second Amended Complaint, as ordered to do on five days notice, they did not, therefore, move to substitute the Estate.

Hayes raised this issue in the hearing in the instant matter, but the court of appeals panel apparently decided that it was not important as they proceeded with the hearing on sanctions.

The issue of substitution has arise in two other pending cases in the Nevada District Court, in which Hayes is counsel.

In CV-S-89-848, Janice Hayes v. Benny Binion, et al., the lead defendant died twenty-four days after Hayes filed the action. Benny Binion claims an interest in certain land and Hayes also has an interest which, under Nevada law, can not be abridged by any court or entity.

The issue therein is that Binion and other defendants have interfered with said right and have transferred or otherwise disposed of the land and other land acquired under various public land statutes and concealed said matters from Hayes.

Hayes wants to trace profits and to ascertain if Binion's interest was placed in a gaming trust under Nevada Revised Statute 463.341.

The Executrix was appointed on June 1, 1990, and Letters Testamentary were

issued on that date and Hayes caused Mrs. Binion, Teddy Jane Binion, to be personally served by the Clark County Sheriff's Office on that date.

In August, 1990, Hayes filed a Motion For Substituion. Judge Philip Pro dismissed the claims against Benny Binion, his Estate and Mrs. Binion as Executrix and trustee of trusts, along with dismissing other defendants, and subsequently ordered Hayes to file a Second Amended Complaint.

Judge Pro certified said order of dismissal, and three others as to other defendants under Rule 54(b) in separate orders. He declared that the motion for substitution was "moot."

On appeal, Case No. 91-15271, a motions panel ruled that the motion for substitution and other orders "appeared not to be final orders," and ordered Hayes to file an Opening Brief without

raising that issue as well as the district court's order striking Hayes Second Amended Complaint, which the court had ordered her to file and a Notice Of Lis Pendens.

Hayes has been forced to take two appeals already in the Binion case and the court of appeals refuses to consolidate said appeals thus necessitating filing two Opening Briefs. Judge Pro also imposed sanctions against Hayes in the lower court.

In Case No. CV-S-85-146-HDM, Fireman's Fund Life Insurance Company v. Janine Adamick, the district court, however, allowed Fireman's to file an Amended Complaint naming the Estate of Kathleen Jo Price as a party without moving for substitution. The Amended Complaint was as of right.

In that case and a consolidated one, the district court also entered four

Rule 54(b) certifications, including one in which he attempted to "refer" what he described as the "ultimate issue," being whether Fireman's must pay proceeds due on life insurance policies, to a state court judge, who declined to accept the "referral" in an action stayed since 1987.

CONCLUSION

The petitioner respectfully suggests that this Honorable Court should grant the petition for writ of certiorari to resolve issues raised therein, which reoccur frequently in the Ninth Circuit.

Respectfully submitted,

JANICE M. HAYES
Counsel Of Record For
Petitioner, Janice M.
Hayes.
3391 S. El Camino Rd.
Las Vegas, NV 89102
(702) 871-5135
Nevada Bar #1881